Newark Morning Ledger *and* Local 8N Graphic Communications Union. Case 22–CA–18837

April 19, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On September 19, 1994, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and Charging Party filed exceptions and supporting briefs. The Respondent filed a brief in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the Respondent did not act unlawfully, we do not rely on his finding that the union chapel chairman and vice chapel chairman act as agents of both the Union and the Respondent when they refer substitute employees pursuant to the parties' past practice and the terms of the parties' agreement. This finding is unnecessary to our conclusion, in agreement with the judge, that Korines' conduct in altering the markup sheet and ignoring the general foreman's denial of permission to book substitute apprentice Flannery was not protected.

Greg Alvarez, Esq., for the General Counsel.
Sidney D. Kress, Esq. and *Barry N. Steiner, Esq.*, for the Respondent.
Paul Montalbano, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on December 7, 8, and 9, 1993, and April 14, 1994. The charge was filed on December 7, 1992, and an amended charge was filed on January 28, 1993. The complaint was issued on February 24, 1992, and alleged that on November 2, 1992, the Respondent by Frank DeSimone threatened William Korines with discharge because of his activities on behalf of the Union as an assistant chapel chairman.

The Respondent essentially concedes the statement allegedly made to Korines, but asserts that under the particular circumstances of this case, Korines was not engaged in protected union activity and therefore could have been disciplined without violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New Jersey corporation, admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company and the Union have had a collective-bargaining relationship for at least 40 years. The Union represents the employer's journeymen and apprentice pressroom employees. The most recent collective-bargaining agreement between the parties is one which has a term from December 13, 1989, to July 14, 1999.[1]

At the present time and the time that the events in this case occurred, the Company operated pressrooms out of two plants, one located in Piscataway and the other in Montville. Frank DeSimone was the Respondent's general foreman.

There is at each plant a group of regularly assigned journeyman and apprentices. These individuals have a set schedule (except for a group called floaters) and are assured of work 5 days a week. Journeymen are pressroom employees who have acquired, by training and experience, the full complement of skills to operate printing presses of the type used by a newspaper. Apprentices, who are paid less, will work in that capacity for a period of time until they acquire the skills necessary to become journeymen. In both cases, the journeymen and apprentices employed by the Newark Morning Ledger are regularly employees of the Company with the full range of benefits called for in the collective-bargaining agreement.

On a fairly regular basis, other employees will be needed for various of the shifts either because one or more of the regular pressroom employees is out sick or on vacation. On other occasions, when the paper will have more pages than usual, this will require the services of additional journeymen and/or apprentices. In those situations, there is a group of substitute pressroom employees, who have been interviewed and approved by the Company and who, on an ad hoc basis, are referred to the Company to work on a particular shift as needed.

The procedure for referring substitute employees is governed by section 3 of the collective-bargaining agreement, and by the ''Mark-Up Agreement'' set forth at pages 23 to 25 of the contract. In pertinent part, these provisions state:

[1] This contract contains, at sec. 28, a broad grievance/arbitration clause, pursuant to which ''any dispute arising under this contract'' may be arbitrated at the instance of either party.

Section 3: (a) The Union agrees to furnish competent pressmen in the numbers required by the publisher in accordance with the terms of this Agreement, it being understood that notice will be given to the Union of help required as set forth in the markup agreement. Once a given number of men have been booked, all such persons booked shall be guaranteed one shift or payment of one shift, provided they appear at the pressroom at the designated starting time. If the Union is unable to furnish workmen as required above, the publisher shall have the right to obtain such help from any source, it being understood that the prevailing rate of wages shall be paid such help.

Markup Agreement

1. The marked-up operating assumptions of the publisher shall consist of a guarantee by the publisher to employ a specified number of journeymen and apprentice situation holders for five day or night shifts each per week. The number of these situation holders required on each scheduled day or night shift shall be designated by the publisher.

2. The Union agrees to make every effort to provide pressmen and apprentices on a straight time basis to meet the marked-up assumptions of the publisher. Such marked-up operating assumptions may be changed on 10 days' notice for such reasons as, for example, changes in advertising patterns, changes in editorial policy, seasonal variations, vacations, or reductions in force. This includes a commitment to make every effort to provide straight time replacements for vacations, men taking sick days, death in family, or trip-ups when such replacements are necessary to meet the manning requirements of the Agreement. The Union also agrees to make every effort to supply straight-time journeymen and apprentices as extras.

3. When competent men or substitutes cannot be secured at straight time rates to meet the publisher's needs, the publisher may use whatever force is available in the pressroom at the time in order to issue the paper without delay.

4. The schedule of each situation holder's days off or nights off shall be provided to the office by the Union (chapel chairman). In order to assist the Union in providing substitutes or extras in accordance with this provision, the publisher agrees that the Union (chapel chairman) shall be notified of the number of men and starting times required of the next day of publication.

There are occasions when extra employees are needed to fill vacancies and when it is impossible for the Union to find substitute journeymen to replace a journeyman's position. In such a circumstance, it may become necessary to place or ''put up'' a substitute apprentice into a journeyman's position. When this occurs, the Union, through its chapel chairman or vice chairman, will seek permission from the press room general foreman (here Frank DeSimone), to ''book'' a person who is designated as a substitute apprentice to work that particular day as a substitute journeyman. That such permission has to be obtained has been the practice of the parties for many years. *This is not in dispute.* Further, the evidence shows that the general foreman evaluates the capabilities of the substitute apprentices to determine if they are capable of being ''booked'' for journeymen jobs.[2] One of the reasons for this is that these people are working with high speed presses and if someone is not competent, the situation can become dangerous.

Korines acknowledges that there has existed a longstanding practice of requiring permission in order to book or ''put up'' a substitute apprentice into a journeyman's spot.[3] He also acknowledges that the Company can refuse to accept such a booking. He asserts, however, that he interprets the contract as meaning that if he, as the Union's vice chapel chairman, decides to put up a substitute apprentice into a journeyman's spot, he can do so despite the Company's nonpermission and the Company's only remedy is to send the booked man home when he shows up for work. To my mind, this interpretation of the agreement is absurd as it would, in effect, give the Company no time to obtain a replacement and would require the Company either to accept an unqualified person or to operate the shift without a full complement of workers. Such an interpretation would therefore nullify those provisions of the contract which gives the Company the right to find a suitable replacement if the Union is unable to supply a man who, in the company's opinion, is competent to do the job. In my opinion, such an interpretation of the agreement is at variance with the parties' intentions as expressed in the language of the contract and by their mutual practice in the manner by which it has been implemented.

Sometime in the autumn of 1992, the Company hired five substitute apprentices to be regular apprentices. These people were thereupon inducted into union membership. At about the same time, the Union also gave membership to three of the substitute apprentices (Deska, Flannery, and Taglia), who were not hired by the Company as regular apprentices. In October 1992, DeSimone told William Tuske Jr. (then the chapel chairman) and Korines (then the vice chapel chairman), that because this group had become union members, did not mean that the chapel chairman could assign them to journeymen positions without DeSimone's permission on a case-by-case basis.

On October 31, 1992, the Piscataway plant foreman, Steven Leotsakos, told Korines, that because the next day's paper was going to require an additional ''roll'' or ''web'' a number of substitute men would be required for the night shift. Korines then started calling people to see if they were available. Korines states that about an hour later, he told

[2] William Tuske Jr. was the Union's vice chapel chairman from 1987 to 1991 and was the chairman in 1992. He testified that he asked permission from Frank DeSimone before booking a substitute apprentice to work as a journeyman because this was the standard practice which preceded his tenure in either position. He testified that there were occasions when his request to put up a substitute apprentice to a journeyman's job were denied. He also testified that DeSimone was uncomfortable with certain apprentices and would only allow them to work in a journeyman's spot if he was really stuck.

[3] Korines testified that when he became assistant vice capel chairman, he heard from his predecessors in that job that DeSimone required prior approval before a substitute apprentice could be booked as a journeyman. He also testified that he was given to understand that if he didn't follow this rule, DeSimone would view it as insubordination and could result in discharge.

Leotsakos that he had not been able to get enough men to cover the shift and suggested that three substitute apprentices be ''put up'' as substitute journeymen. According to Korines, Leotsakos said that he could not O.K. this without first talking to General Manager Frank DeSimone.

According to Korines, about 15 minutes later, he told DeSimone that in order to fill the journeymen spots he would have to put up three substitute apprentices. He states that DeSimone said that he had no problem with that but that he wanted to make sure that the booking was done fairly and indicated that some apprentices were getting more shifts than others. According to Korines, he then handed the phone to Billy Neals, the Union's vice president. Korines states that at no time during this conversation was there any mention of an employee named Flannery.

Korines states that he called up the substitutes to confirm their assignments and put their names onto the markup sheet which he showed to Leotsakos. Korines states that after Leotsakos left for the evening, he placed the markup sheet, with the night's assignments, on the clipboard in the office so that the night foreman could see it when he arrived at work. This markup sheet was designated as both General Counsel's Exhibit 8 and Respondent's Exhibit 4. Examining both documents indicates that, initially, Flannery was put on the sheet as an apprentice and that his name was erased and thereupon placed on the list as a journeyman to substitute for G. Shown. In short, these documents tend to show that Korines, after Leotsakos left for the evening, moved Flannery from the apprentice category to the journeyman category by altering the markup sheet for that evening's assignments.

Steve Leotsakos testified that during the afternoon of October 31, 1992, Korines told him that he was having a hard time finding substitutes. He states that, at some point, Korines suggested that he wanted to put up substitute apprentices Huey Taglia Jr., Ward Deska, and Robert Flannery as journeymen for the night shift. According to Leotsakos, he told Korines that he could not allow these three to be assigned to journeymen spots without first talking to Frank DeSimone. He states that he then spoke to DeSimone on the phone who approved the proposed assignments for everyone except Flannery and that he informed Korines of this decision. He states that Korines asked to speak to DeSimone and that he heard Korines say that he was stuck for people and needed to put up Flannery because he couldn't get anyone. Leotsakos states that he then heard Korines say: ''This is bull shit,'' whereupon Korines came out of the office and handed the phone back. Leotsakos states that when he got back on the phone, DeSimone told him that Flannery was not to be put up. (That is, assigned to a journeyman's job.)

Leotsakos testified that, about 15 minutes after the phone call described above, Bill Neals told him that Korines has exhausted all efforts to fill the journeyman's spot. Leotsakos states that he reiterated DeSimone's position regarding Flannery whereupon Neal asked to be allowed to call DeSimone. According to Leotsakos, after Neal spoke to DeSimone, he (Leotsakos) spoke to DeSimone who repeated that Flannery was not to be put up. Leotsakos was shown General Counsel's Exhibit 8 and Respondent's Exhibit 4 and testified that he wrote Flannery's name on the markup sheet as being assigned to the apprentice and not the journeyman position.

Neals testified that on October 31, 1992, at some point between 1 and 3:15 p.m., he spoke to DeSimone on the telephone about the subject of hiring minority substitute apprentices and that DeSimone said that he was a little upset about some of the men getting five shifts while others were getting only two. He testified that nothing was said during this conversation about Flannery and that DeSimone did not refuse permission to book any substitute apprentices.

Frank DeSimone testified that on October 31, 1992, he received a call from Leotsakos who told him that Korines was requesting that certain regular substitute apprentices, including Flannery, be assigned as journeymen for the evening shift. He testified that he told Leotsakos that all of the proposed assignments were O.K. except for Flannery who could not be put up as a journeyman. According to DeSimone, he spoke to Korines that afternoon and told him that Flannery could not be put up. DeSimone testified that later in the afternoon, Billy Neals called him from Leotsakos' office and said that they were still having trouble getting enough journeymen and that they still wanted to use Flannery. DeSimone testified that he told Neals that he was not going to permit Flannery to be put up.[4] DeSimone also recalls that during the conversation with Neals, there also was a more general discussion about making sure that the booking of substitute apprentices was done fairly.

Needless to say, Flannery showed up to work and was, in accordance with the markup sheet, assigned to work as a journeyman on the night shift. When informed of this, DeSimone called William Tuske Jr. and asked what was going on with the booking in that he had specifically told Neals that Flannery was not to work as a journeyman. This is confirmed by Tuske, who at that time was the Union's chapel chairman and who testified that DeSimone was upset when he called. (At the time of the hearing, Tuske was employed as a foreman employed by the Company.)

According to Korines, on November 2, 1992, he received a phone call at home from Tuske who told him that his job was on the line. In this regard, Tuske testified that on Monday or Tuesday, he called Korines and told him that DeSimone was upset because Korines had booked Flannery and that he (Korines) had better straighten this out.

Korines testified that after talking with Tuske, he called Leostakos to find out why his job was being threatened. Korines states that Leotsakos called back and said that DeSimone wanted to speak to him whereupon he placed a call to DeSimone who said that he wanted to know who authorized Flannery to go up as a journeyman. Korines claimed that during the October 31 conversation, he had not been prohibited from moving Flannery up as a journeyman and that the conversation only had to do with the general subject of booking substitutes in a fair manner. According to Korines, DeSimone replied that he had told Korines that Flannery could not be booked as a journeyman and said that he was sick and tired of the way Korines was doing the booking. Korines testified that DeSimone further stated, ''I should fire you.''

[4] DeSimone, although acknowledging that there had been a few times in the past when Flannery had worked as a substitute journeyman, asserted that he did not believe that Flannery was qualified to do the work in that category. (See R. Exhs. 5–9.)

DeSimone's testimony regarding his conversation with Korines on November 2, 1992, is not substantially different from the version given by Korines. He asserts that he told Korines that he had screwed up the booking by putting up Flannery after being told not to do so. He testified that Korines claimed that he (DeSimone) had given him permission to put up Flannery to which he replied that Korines was ''full of shit.'' DeSimone testified that Korines had engaged in insubordination and that he could be discharged for this.

On November 4, 1992, Korines and Tuske went to a grievance meeting on an unrelated matter with DeSimone who objected to Korines being present at this meeting and said that he should have fired him for booking Flannery. Tuske insisted that Korines remain at the meeting and DeSimone backed down on this point.

Apart from the oral threats of discharge, Korines never received any other form of discipline for the actions of October 31, 1992.

III. ANALYSIS

It seems to me that pursuant to the parties' past practice and consistent with the terms of the collective-bargaining agreement, the Union's chapel chairman and/or vice chairman act as agents of both the Union and the employer when referring substitute employees in both the journeyman and apprentice categories. As such, I think that the General Counsel is incorrect in characterizing this function as being solely a union function.

On October 31, 1992, Korines as the vice chapel chairman, was asked to provide substitutes for the night shift and after making an effort to find suitable personnel, asked Leotsakos for permission to ''put up'' three substitute apprentices to work that evening in journeyman jobs. Foreman Leotsakos told Korines that DeSimone would have to authorize the assignment of the three men in question, these being Huey Taglia Jr., Ward Deska, and Robert Flannery.

Based on the record as a whole and my observation of the demeanor of the relevant witnesses, I conclude that DeSimone approved the assignment of Deska and Taglia to journeymen jobs but explicitly refused to allow Flannery to be put up as a journeyman. I further find, for purposes of this proceeding, that Korines, having been notified of the refusal, decided to take matters into his own hands and physically modified the markup sheet by changing Flannery's assignment from apprentice to journeyman.

Korines testified that he interpreted the contract as meaning that he could, as vice chapel chairman, ignore the Company's refusal to give permission and refer a substitute apprentice to work as a substitute journeyman, with the Company having the remedy of refusing to allow the referred man to work the shift. As I have already indicated, this interpretation of the contract would effectively nullify section 3(a) thereof and is inconsistent with the acknowledged longstanding practice of the parties. In effect, Korines' interpretation would put the Company in the position of either accepting the nonapproved substitute or of sending him home and not having enough time to find a suitable person to man the job. In short, it is my opinion, that Korines, acting on his own, was seeking to unilaterally change the agreed-upon terms and conditions of referring substitutes for employment. Moreover, I find that in furtherance of this object, he altered the markup sheet in an effort to avoid the fact that DeSimone had refused to grant permission to have Flannery put up as a journeyman on the evening of October 31, 1992.

The actions of a shop steward (or for that matter any employee) who honestly and reasonably seeks to enforce the terms of a collective-bargaining agreement constitutes protected concerted activity within the meaning of Section 7 of the Act. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), where the Supreme Court upheld the Board's *Interboro* doctrine.[5] See also *Howard Electric Co*., 285 NLRB 911 (1987), and *Freeman Decorating Co*., 287 NLRB 1235, 1239–1240 (1988). In the latter case, the administrative law judge found that the employer violated the Act by discharging a shop steward because of his activities in that role. The administrative law judge stated that when an employee is discharged for protected activity, the burden shifts to the employer to show that it had an honest belief that the employee engaged in misconduct. As the adminisrtative law judge concluded that the employee did not engage in any misconduct (alleged threats), and the employer did not have an honest belief that he did so, the employer did not meet its burden of proof.

Although the actions of a shop steward in seeking to enforce the provisions of a contract (if done in an honest and reasonable manner) is protected under the Act, this does not mean that he or she is granted unlimited license. For example, even when the General Counsel has made out a prima facie case that the employer discharged a shop steward because of his threat to file a large number of grievances, the actions of the steward may lose the Act's protection, when the employer can establish that he or she acted in an insubordinate and overly disruptive manner. *Postal Service*, 268 NLRB 274 (1983).

In *Carolina Freight Carriers Corp*., 295 NLRB 1080 fn. 1 (1989), an employee was held to have lost the protection of the Act when, although asserting a contract right, he persisted in challenging his supervisor's direct order to clock out. In this regard, the Board noted that ''the employee was lawfully discharged as he should have followed his supervisor's order to clock out and then invoked the appropriate collective-bargaining procedures for asserting his claim.''

In *Roadway Express*, 271 NLRB 1238 (1984), the Board held that an employer lawfully discharged an employee where that employee, in furtherance of his Union's grievance, surreptitiously obtained business records (bills of lading), from the employer's office which he then turned over to the Union's shop steward.

In the present case, it is my belief that Korines was not honestly and reasonably acting to enforce the terms and conditions of the existing collective-bargaining agreement. On the contrary, I believe that he was acting with the intent of unilaterally changing the terms of the agreement and the longstanding practice of the parties with respect to the assignment of substitute journeymen and apprentices. To make matters worse, I believe that the evidence warrants the inference that after Leotsakos left on the evening of October 31,

[5] *NLRB v. Interboro Contractors*, 388 F.2d 495 (2d Cir. 1967). In *NLRB v. City Disposal Systems*, the Court held that a single truckdriver, who honestly and reasonably believed that the brakes of his trucks were unsafe, engaged in concerted and protected activity when he refused to operate the vehicle where the collective-bargaining agreement contained a provision which allowed employees to refuse to drive unsafe equipment.

1992, Korines altered a business record, namely, the markup sheet, which is the document telling the night foreman, which employees are to be assigned as journeyman and which are to be assigned as apprentices.

In conclusion, it is my opinion, that Korines was not engaged in protected activity and that the threatened discharge by DeSimone was not unlawful within the meaning of Section 8(a)(1) and Section 7 of the Act.

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.